

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARNOLD SCHOLNICK and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, New York, NY

*Docket No. 02-756; Submitted on the Record;
Issued January 8, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation.

Appellant's claim was filed on December 26, 1989. It was accepted for a lumbosacral strain after he twisted his back and pulled a muscle while reaching to take out old tile and replace it with new. He stopped work and underwent extensive physical therapy prescribed by his treating physician, Dr. Mauro M. Cataletto, a Board-certified orthopedic surgeon, who advised appellant that his pain problem was primarily due to his degenerative disc disease.

Appellant subsequently moved to Florida, where he became a patient of Dr. Clifton D. Okman, a chiropractor. On May 24, 1994 Dr. Okman reported that appellant was totally disabled due to the fall he sustained in 1989. He diagnosed internal lumbar disc derangement, sciatic radiculopathy and discogenic spondylosis. Dr. Okman recommended a work hardening program and referred appellant to Dr. Brad S. Chayet, a Board-certified orthopedic surgeon.

In an October 22, 1999 report, Dr. Chayet diagnosed degenerative disc disease, spinal stenosis and disc herniation at L4-5 and L5-S1, based on a magnetic resonance imaging (MRI) scan dated November 29, 1995.

On February 25, 2000 the Office referred appellant to Dr. Georges Boutin, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on his March 22, 2000 report, the Office issued a notice of proposed termination of compensation on March 31, 2000. On May 5, 2000 the Office terminated appellant's compensation.

Appellant requested reconsideration, which the Office denied on February 21, 2001 on the grounds that the legal argument submitted was insufficient to warrant modification of its prior decision.

The Board finds that the Office met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.²

In this case, appellant claimed that he twisted his back on December 26, 1989 while installing tile. The initial diagnosis on February 15, 1990 was a lumbosacral strain resulting from "twisted lower back on ladder at work. Accordingly, the Office accepted this injury as work related.³ On May 7, June 7 and July 5, 1990 Dr. Cataletto reported a normal neurological examination of the back. A July 24, 1990 MRI scan of the lumbar spine showed discogenic disease, with herniated disc at L5-S1.

Dr. Cataletto completed a medical form indicating that the herniated disc was due to the work injury, but failed to provide any rational opinion on the causal relationship. A fitness-for-duty examination on October 25, 1990 found appellant capable of regular work with no restrictions or accommodations. Dr. Cataletto advised appellant in July 1991 that his lower back pain was primarily due to degenerative disc disease in the lumbar spine.

After appellant moved to Florida, he was treated by Dr. Okman, who reviewed appellant's treatment history and opined that his discogenic spondylosis in the lumbar spine was accelerated by the injury, which he described as a fall at work. The Office informed appellant that Dr. Okman was not considered a physician under the Federal Employees' Compensation Act because x-ray films failed to reveal a subluxation of the spine.⁴

Dr. Chayet, to whom Dr. Okman referred appellant, stated in a March 8, 2000 report that appellant was seen as a follow up for injuries sustained on December 26, 1989, when a lumbar strain was diagnosed. He diagnosed degenerative disc disease of the lumbar spine, spinal stenosis, chronic lower back pain and disc herniations.

However, contrary to the arguments presented by appellant's attorney on reconsideration, Dr. Chayet provided no opinion on whether the lumbar strain sustained on December 26, 1989 had resolved. In fact, his March 2000 report does not address this issue. Further, he failed to opine whether the back conditions he diagnosed were related to the accepted work injury.

¹ *Betty Regan*, 49 ECAB 496, 501 (1998).

² *Raymond C. Beyer*, 50 ECAB 164, 168 (1998).

³ Dr. Cataletto reported on March 23, 1990 that appellant had experienced a similar problem a year earlier, but that injury had resolved spontaneously.

⁴ See *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000) (the Act includes chiropractors under section 8101(2) "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary").

Finally, on April 5, 2000 Dr. Chayet noted that Dr. Boutin's opinion that appellant's lumbosacral strain had resolved but did not comment further. Because Dr. Chayet offered no conclusions on causal relationship, his reports cannot create a conflict in the medical opinion evidence with that of Dr. Boutin, the second opinion physician.⁵

Dr. Boutin reported a history of appellant's initial work injury, noting his retirement thereafter. He reviewed appellant's treatment and the diagnostic testing and examined appellant's spine, noting complaints of pain on palpation. Dr. Boutin found "surprisingly good" range of motion, normal extension, rotation and laterality. Appellant walked easily on his heels and toes. The neurological examination was normal and the straight leg-raising test was negative. Based on this examination and the lack of visible neurological deficit, Dr. Boutin concluded that appellant's lumbosacral strain had resolved. Appellant's continued low back pain was related to his degenerative disc disease compounded by his weight. While appellant could not return to his date-of-injury carpenter's position, his disability was due to his age, weight and degenerative disc disease. Dr. Boutin found no physical restrictions "strictly based on the work injury."

Appellant's attorney argued that Dr. Boutin's opinion was conclusory and that he provided no medical rationale. However, Dr. Boutin did provide a medical basis for his conclusion that the lumbar strain accepted as a work injury in 1989 had resolved. He found no neurological defects, a finding noted by Dr. Cataletto 10 years prior. Dr. Boutin reported normal clinical results on examination, and reviewed the MRI scan and x-rays, which showed disc herniation but no subluxation. He attributed appellant's ongoing back pain to his degenerative disc disease and excess weight. The Board finds that his report is sufficiently rationalized to establish that the accepted work injury had resolved. Therefore, the Office met its burden of proof in terminating appellant's compensation.⁶

⁵ *Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (medical evidence that offers no opinion on the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

⁶ *See Jimmie H. Duckett*, 52 ECAB ____ (Docket No. 99-1858, issued April 6, 2001) (opinion that appellant's back condition was due to the natural progression of his spondylitis was sufficiently rationalized to establish that his work-related back condition had resolved and to meet the Office's burden of proof in terminating compensation).

The February 21, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
January 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member